Supreme Court, U.S.
FILED

981745 APR 30 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KEITH VAN HORNE,

Petitioner,

v.

EVERGREEN MEDIA CORPORATION, a Delaware corporation, and WRCX RADIO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

PAUL M. LEVY*
PHILLIP J. ZISOOK
BRIAN D. SAUCIER
DEUTSCH, LEVY & ENGEL, CHARTERED
225 West Washington Street
Suite 1700
Chicago, Illinois 60606
(312) 346-1460

Attorneys for Petitioner

* Counsel of Record

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

9218

QUESTIONS PRESENTED FOR REVIEW

1. In *Cohen v. Cowles Media Co.* this Court held that the First Amendment does not shield the media from laws of general application. In his Complaint, Keith Van Horne alleged that Respondents Evergreen Media Corporation and WRCX Radio negligently hired and retained radio personality "Mancow" Muller knowing, through his history of injury causing and criminal broadcast conduct and speech, that Muller was likely to cause further injury to others in the course of his broadcasts. Does the First Amendment shield Evergreen and WRCX from liability for negligently hiring, supervising and retaining Muller and demand stricter scrutiny than would be applied to enforcement of these torts against other persons or organizations?

2. In *New York Times Co. v. Sullivan* this Court held that proof of actual malice provided the breathing space required by the First Amendment in public figure defamation cases, thus striking a balance between the right of speech and the right to seek redress for injury to reputation caused by defamatory speech. Van Horne, a public figure, alleged that "Mancow" Muller's defamatory broadcast statements were made with actual malice pursuant to *New York Times* and adopted this standard in the negligent hiring, supervision and retention counts against Evergreen and WRCX arising from his reputational injury. Does the First Amendment's "breathing space" also require stricter scrutiny of pleading and proof requirements in enforcing laws of general application, such as negligence, against a media defendant?

PARTIES BEFORE THE SUPREME COURT OF ILLINOIS

The parties before the Supreme Court of Illinois were appellee Keith Van Horne and appellants Irma Blanco, Evergreen Media Corporation, a Delaware corporation, and WRCX Radio. Blanco is not a party to this Petition.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES BEFORE THE SUPREME COURT OF ILLINOIS ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. THE ILLINOIS COURT'S CREATION OF HEIGHTENED PLEADING AND PROOF BURDENS IN NEGLIGENCE ACTIONS AGAINST MEDIA EMPLOYERS WILL EXEMPT THEM FROM LAWS OF GENERAL APPLICATION 11

A. The Fact That Speech Is Indirectly Impacted by Enforcement of Laws of General Applicability Is Not a Basis to Grant a Special Immunity to Media Employers in Actions for Negligent Hiring and Supervision of Broadcast Personalities 13

B. The Illinois Court's Opinion Conflicts with the Decisions of Other Courts and Will Invite Disparate Rulings as to Whether the First Amendment Is a Shield Against Liability for Negligent Employment Torts Lodged Against Media Defendants 15

II. THE CONSTITUTIONAL MALICE REQUIREMENT OF *NEW YORK TIMES CO. v. SULLIVAN* PROVIDES AND DEFINES THE BREATHING SPACE FOR THE FIRST AMENDMENT WHEN A NEGLIGENT HIRING INJURY IS BASED UPON A DEFAMATION 20

CONCLUSION 25

APPENDIX . . . . . *infra*

TABLE OF AUTHORITIES

Cases: PAGE(S)

Anderson v. Strong Mem'l Hosp.,
573 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991) 14

Bates v. Doria,
502 N.E.2d 454 (Ill. App. Ct. 1986) 13

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) . . . . . *passim*

Dickerson v. Raphael,
564 N.W.2d 85 (Mich. Ct. App. 1997) 14

Food Lion Inc. v. Capital Cities/ABC Inc.,
984 F. Supp. 923 (M.D.N.C. 1997) 14-15

Galella v. Onassis,
487 F.2d 986 (2d Cir. 1973) 12

Gonzales v. National Broadcasting Co., Inc.,
155 F.3d 618 (2d Cir. 1998) 17, 18, 19

Herbert v. Lando,
441 U.S. 153 (1979) 18

Johnson v. Mers,
664 N.E.2d 668 (Ill. App. Ct. 1996) 13

Malorney v. B&L Motor Freight, Inc.,
496 N.E.2d 1086 (Ill. App. Ct. 1986) 13

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 9, 10, 20, 24

Rice v. Paladin Enters., Inc.,
128 F.3d 233 (4th Cir. 1997),
cert. denied, ___ U.S. ___,
118 S. Ct. 1515 (1998) 14, 23, 24

Shulman v. Group W Productions, Inc.,
955 P.2d 469 (Cal. 1998) 19

United States v. Smith,
135 F.3d 963 (5th Cir. 1998) 18

Constitutional Provision:

U.S. Const., Amend. I 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Van Horne respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in the above titled proceeding on December 3, 1998.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 185 Ill. 2d 299, 705 N.E.2d 898 (Ill. 1998) and is Appendix 1. The Illinois Appellate Court's decision is reported at 294 Ill. App. 3d 649, 691 N.E.2d 74 (Ill. App. Ct. 1998) and is Appendix 2. The Supreme Court of Illinois' notice denying rehearing is Appendix 3. The trial court's order, dismissing Counts V-VIII of the Second Amended Complaint is Appendix 4. The Second Amended Complaint, filed July 7, 1995, is Appendix 5.

JURISDICTION

The Judgment of the Supreme Court of Illinois was entered on December 3, 1998. Petitioner's Petition for Rehearing was denied on February 1, 1999. This Petition for Certiorari is filed within 90 days of said denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

STATEMENT OF THE CASE

"Do whatever you want to do—just entertain, have fun." (App.5, p.57a, ¶58, quoting President of defendant Evergreen Media Corporation's direction to employee Matthew "Mancow" Muller.)

"They've given me a program director who keeps out of my face. I have complete freedom." (App.5, p.57a, ¶58, quoting Matthew "Mancow" Muller.)

Defendants Evergreen and WRCX Radio (collectively "Evergreen") broadcast a radio program known as Mancow's Morning Madhouse throughout the Chicago Metropolitan Area. (App.5, pp.33a, 34a, ¶¶2, 4).[1, 2] Defendant Matthew "Mancow" Muller,[3] is a Chicago area radio personality and host of the program. (App.5, p.33a, ¶ 2.) This Petition concerns a broadcast

---

[1] References to the attached Appendices are preceded by the designation "App."

[2] Petitioner's Second Amended Complaint, included as Appendix 5, was pending before the lower court at the time the causes of action at issue were dismissed.

[3] Muller is not a party to this Petition and, at the time of this writing, defamation counts are pending against Muller, Evergreen and WRCX for Muller's statements in the course of the Broadcast and his republication thereof.

of Muller's program on November 11, 1994, between 5:30 a.m. and 10:00 a.m. (the "Broadcast.") (App.5, p.34a, ¶4.)

In the course of the Broadcast, defendants told the Chicago Metropolitan Area listening audience that plaintiff, former Chicago Bear and then WLUP radio personality Keith Van Horne, had waited for Muller to arrive at WRCX studios that morning, and between 5:00-5:30 a.m., attacked Muller and threatened to kill him, while chasing him down the hall with "blood-shot eyes" and "flared lips." (App.5, pp.41a-42a, ¶15.) The trial court found that Van Horne stated a cause of action for defamation *per se* against Muller and Evergreen. This finding was not challenged on appeal.

The Negligent and Reckless Hiring, Supervision and Retention Counts[4]

Van Horne alleged that before hiring Muller, Evergreen knew or should have known of the following conduct of Muller that occurred in the course of his employment as a radio personality in California:

a. obstructing public access to the San Francisco Bay Bridge and causing a three-hour traffic jam involving 35,000 commuters on May 26, 1993 so that Muller's KSOL (n/k/a KYLD) sidekick could get a haircut in a van stopped on the bridge. As a consequence of his conduct and plea of no contest to causing a public nuisance, Muller was fined $500,

---

[4] Referred to collectively herein as the "negligent employment counts."

sentenced to 100 hours of community service, and sentenced to three years of probation by San Francisco Municipal Court, and was suspended from KSOL, a direct competitor of Evergreen-owned KMEL. As a further result of his extreme and outrageous conduct, Muller and KSOL are defendants in a $4 million public nuisance class action brought by injured commuters. In the course of his criminal prosecution, Muller apologized in public and stated, in words or substance, that he had "misjudged the power of radio";

b. falsely broadcasting that the Golden Gate Bridge toll had risen from $3 to $5. Bridge officials reprimanded Muller because many KSOL listeners believed Muller's report and overpaid their tolls;

c. hanging a "Welcome to Chicago" banner over the receiving gates during the Christmas rush at San Francisco International Airport and watching travelers panic as they deplaned;

d. dropping cinder blocks off a California Bayshore overpass and causing damage to cars parked below;

e. causing KSOL listeners to storm the San Francisco State University library on March 4, 1994 by announcing during his program that $500 was hidden in a book;

f. designating "Alzheimer's Awareness Day" and visiting a geriatric center in San Francisco to mock aged individuals with the debilitating illness by asking them trivia questions they were unable to answer over the public airwaves.

(App.5, pp.52a, 53a-54a, ¶¶ 46, 48, 49.)

The complaint also alleged the following conduct of Muller subsequent to Muller's hiring at Evergreen but prior to the Broadcast:

> a. declaring a day "Roadkill Tuesday" and offering $103.50 to WRCX listeners who left dead animals at Frankfort's Town Center mall on September 6, 1994; listeners responded by depositing rotting animal carcasses at the mall; as a direct consequence of Muller's conduct, the city had to flush the area with chlorine and 3,000 gallons of water to prevent possible outbreaks of disease; WRCX was fined $500 and charged $505 for the cleanup;
>
> b. directing his sidekick, Turd, to stand on the North Avenue bridge over Lake Shore Drive during Muller's broadcast in or about October, 1994 with a sign that read "Honk and we'll drop a cinder block"; police stormed the WRCX studio and stopped Muller's show; Turd was arrested, fined $800, and sentenced to 120 hours of community service and one year supervision; WRCX station manager Dave Richards was required to provide an on-air apology.

(App.5, pp.56a-57a, ¶¶ 57-60.)

The circuit court dismissed with prejudice all four of the negligent employment counts against Evergreen (Counts V-VIII). (App.4, p.32a.) In its motion to dismiss, Evergreen argued that allowing employment torts to proceed against a media entity where the injury alleged was caused by broadcast speech would result in a chilling effect on First Amendment speech. Evergreen claimed that potential liability for the negligent employment torts would cause media defendants to

"guess" at what broadcast speech and conduct would subject them to liability and what employees they could safely hire.

The Appellate Court reversed and remanded the circuit court's orders on January 30, 1998, thus reinstating each of the negligent employment counts. In so holding, the court stated:

> Defendants express concern that this holding will result in a "chilling effect" on free speech as media companies will be discouraged from hiring controversial broadcasters. We disagree. The issue before us is whether a complaint alleging negligent and/or reckless hiring, supervision, and retention can withstand a legal challenge under section 2-615 of the Illinois Code of Civil Procedure where the complaint does not allege physical injury. As noted above, we find that there is no requirement that physical injury be alleged. Without expressing an opinion about defendants' ultimate liability in the present case, we note that the intent of this holding is not to discourage companies from hiring controversial broadcasters; rather, the intent is to protect innocent persons from defamatory remarks.
>
> Defendants also express concern over the burden placed on the communications industry by our holding. Specifically, defendants argue that this holding could impose liability on employers for not accurately predicting what a broadcaster might say on the air. We do not consider a review of a prospective employee's past to determine his or her fitness for a job as a broadcaster to be unduly burdensome.

(App.2, pp.29a-30a.)

On June 3, 1998, the Supreme Court of Illinois granted Evergreen's petition for leave to appeal. *Van Horne v. Muller*, 699 N.E.2d 1038 (Ill. 1998). In its decision, the Illinois Court reversed the decision of the appellate court as it related to the negligent employment counts. The Illinois Court did not address or acknowledge Muller's propensity for engaging in injury-causing broadcast speech and conduct. Instead, it found "that Muller had previously engaged in offensive or outrageous conduct during his radio programs does not establish that he had a propensity to make false, defamatory statements . . . this conduct was not sufficient to put defendants on notice that Muller would make false, defamatory statements on the air if WRCX and Evergreen hired him." (App.1, p.14a.) Specifically, the Court found:

> The type of prior conduct by an employee which will be sufficient to put an employer on notice that the employee is unfit for a particular position will differ in every case. In this case, we employ a narrow interpretation of this requirement because of the First Amendment concerns which arise when liability is predicated on speech.
>
> * * *
>
> [R]ecognition of this cause of action where the employee had previously engaged only in "outrageous," but nondefamatory, conduct or speech would run afoul of First Amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial fig-

> ure, the reasoning being that such controversial figures are "likely" to engage in defamatory speech. Such a holding would have an inevitable chilling effect on free speech, as media employers would be reluctant to hire controversial broadcasters or reporters. The law of defamation must not only protect the individual's interest in vindicating his good name and reputation, but also allow the First Amendment guarantees the 'breathing space' essential to their fruitful exercise." (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Imposing liability for negligent hiring or retention under these circumstances would not grant the first amendment guarantees sufficient "breathing space." Whether we would ever recognize a cause of action for negligent hiring or retention based on an employee's defamatory statements is not decided in this case. We hold only that this cause of action may not be premised solely on allegations that an employer hired an employee who had previously engaged in controversial, but nondefamatory, speech or conduct.

(App.1, pp.16a-17a.) Van Horne's Petition for Rehearing was denied on February 1, 1999. (App.3, p.31a.)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In holding that the elements for negligent employment torts are to be scrutinized more narrowly in actions against media defendants where the underlying injury is caused by a defamation, the Illinois Court ignored controlling constitutional precedent. It instead impermissibly heightened the *prima facia* elements of the torts as applied to the media without regard to either the standard for enforcement of laws of general application as established in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) or the standard for liability consistent with the First Amendment for a public figure defamation under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Illinois Court's decision will serve as a license for media defendants throughout the country to avoid liability for laws of general application solely on the ground that speech is indirectly impacted. As a result, this Court's clear pronouncement to the contrary in *Cohen* will unravel under the weight of inconsistent decisions as to whether media defendants are afforded greater protection from negligent employment torts than other employers.

The Illinois Court's opinion ignores the precedent of *Cohen v. Cowles Media Co.* and its progeny holding that torts of general application, such as negligent hiring, supervision and retention, are to be applied against the media unrestrictively and without heightened scrutiny, despite a possible indirect impact on speech. The Illinois Court also failed to recognize that *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

and its progeny define the protection afforded any speech concerns in public figure defamation cases without the heightened pleading and proof requirements now required by the court. *New York Times* requires actual malice, *i.e.*, allegation and proof with convincing clarity that a media defendant published a defamation with actual knowledge of its falsity or with reckless disregard for the truth. Notwithstanding that Van Horne pled and met the *New York Times* standard of actual malice in each of the negligent employment counts, the Illinois Court further subjected the pleading and proof requirements in a negligence action to a heightened level of scrutiny based solely on the defendants' status as a media entity.

Van Horne's Complaint included allegations of historical acts of broadcast speech and conduct on the part of radio personality Muller, resulting in injuries to third persons in addition to criminal sanctions and civil penalties against Muller, his radio sidekicks and his employers prior to his employment at Evergreen and prior to his defamation of Van Horne. Evergreen thus had actual knowledge that Muller was likely to injure others through his broadcast conduct and speech, but hired and retained him notwithstanding these propensities. Evergreen must be as accountable for its negligence as nonmedia employers; the Illinois Court's opinion erroneously cloaks the media with a special immunity for its negligent acts as an employer.

Certiorari is mandated to clarify the uncertainty created by the Illinois Court's decision and to resolve whether, with respect to their hiring and employment decisions, media defendants are above the law.

I. THE ILLINOIS COURT'S CREATION OF HEIGHTENED PLEADING AND PROOF BURDENS IN NEGLIGENCE ACTIONS AGAINST MEDIA EMPLOYERS WILL EXEMPT THEM FROM LAWS OF GENERAL APPLICATION.

The Illinois Court has subjected laws of general application, *i.e.* negligent hiring, supervision and retention, to stricter scrutiny when applied to the media than are applied against other persons or organizations. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), a case involving media publication of information a reporter promised would not be published, and upholding plaintiff's resulting action for promissory estoppel, Justice White announced the rule which explicitly rejected such deference to the media:

> This case however, is not controlled by [the cases cited by the media] but rather by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity breach and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even through the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copyrighted material without obey-

> ing the copyright laws. Similarly, the media must obey the National Labor Relations Act, and the Fair Labor Standards Act; may not restrain trade in violation of the antitrust laws; and must pay nondiscriminatory taxes. It is therefore beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press v. NLRB*, supra, 301 U.S. at 132-33. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.
>
> There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Id. at 669-70 (internal citations omitted). *See also*, *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973) ("[t]here is no threat to a free press in requiring its agents to act within the law").

A. The Fact That Speech Is Indirectly Impacted by Enforcement of Laws of General Applicability Is Not a Basis to Grant a Special Immunity to Media Employers in Actions for Negligent Hiring and Supervision of Broadcast Personalities.

The Illinois Court's opinion contravenes *Cohen*'s mandate by requiring that, in cases brought against the media for negligent employment torts, the element of foreseeability is met only when the employee has previously committed the identical tort. Specifically, the Illinois Court reasoned "we employ a narrow interpretation of this requirement because of the First Amendment concerns which arise when liability is predicated on speech." (App.1, p.16a.) Thus, the Illinois Court held that only if Muller had defamed others in the past would liability attach on a negligent hiring or supervision theory. This departure from long standing constitutional precedent requires clarification from this Court because it grants broadcasters license to avoid liability for laws of general application simply as a consequence of their media status.[5] Moreover, whether or not Muller

---

[5] Contrary to the Illinois Court's Opinion, the law in Illinois has never been that an employee must have caused the precise injury in the past to put an employer on notice of his unfitness for the job. Rather, liability attaches as long as the employer knew or should have known that the employee was likely to cause injury to others through his employment. *Johnson v. Mers*, 664 N.E.2d 668 (Ill. App. Ct. 1996); *Bates v. Doria*, 502 N.E.2d 454 (Ill. App. Ct. 1986). As the Court held in *Malorney v. B&L Motor Freight, Inc.*, 496 N.E.2d 1086 (1st Dist. 1986), it is not essential that one should have foreseen the precise injury which resulted from the act or omission. Rather, the injury must be the natural and probable result of

(continued...)

previously defamed others in the past begs the question. Muller's prior criminal, penalty-causing and injury-producing broadcast conduct and speech unquestionably put Evergreen on notice of Muller's particular unfitness as a broadcaster.

Contrary to the Illinois Court's rationale, *Cohen* has served as the touchstone by which courts, until now, have consistently and without qualification applied laws of general application to media entities. *Cohen* and its progeny demonstrate that media entities are held accountable for laws of general application, such as negligence, pursuant to the same standards as non-media parties, notwithstanding the fact that speech is indirectly implicated. *See Anderson v. Strong Mem'l Hosp.*, 573 N.Y.S.2d 828, 830 (N.Y. Sup. Ct. 1991) (First Amendment did not shield news publisher from liability in contribution action arising from tortious invasion of privacy). *Accord Dickerson v. Raphael*, 564 N.W.2d 85, 92 (Mich. Ct. App. 1997) (eavesdropping is a law of general applicability which the First Amendment does not shield and which only has an incidental impact on speech); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243-246 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1515 (1998) (criminal aiding and abetting charges were laws of general applicability, only incidentally impacted speech and were to be fully applied even though liability was predicated upon defendants' media publication); *Food Lion Inc. v. Capital*

---

[5] (...continued)
the negligent act or omission such that an ordinary and prudent person ought to have foreseen as likely its occurrence as a result of the negligence.

Cities/ABC Inc., 984 F. Supp. 923, 929 (M.D.N.C. 1997) (rejecting the propositions that (i) laws of general application should not be applied against media defendants; and (ii) such application would have a chilling effect on news gathering which would violate the First Amendment).

The Illinois Court's opinion invites the very trammeling of rights *Cohen* and its progeny preclude. Rather than applying established precedent to the facts of this case, the Illinois Court created a new rule of law which redefined the elements of the negligent employment torts based solely on the defendants' media status. It held that Muller's conduct could only have been foreseeable if he had committed the identical tort in the past. Media defendants will now seize this opportunity to argue the erosion of the holding in *Cohen* and the creation of a protected status for media entities, insulating them from liability for their negligence in hiring and retaining dangerous employees such as Muller.

B. The Illinois Court's Opinion Conflicts with the Decisions of Other Courts and Will Invite Disparate Rulings as to Whether the First Amendment Is a Shield Against Liability for Negligent Employment Torts Lodged Against Media Defendants.

The Supreme Court of Illinois's decision is a dangerous step toward the dismantling and evisceration of *Cohen* and has provided media defendants an unconstitutional shield against persons injured as a result of broadcast speech or conduct. The Illinois Court's shift

in liability and constitutional precedent is such that other courts will have a basis upon which to grant the media protections neither intended nor recognized by this Court.

The rationale of the Illinois Court appears to be the following: Since Muller, as a radio personality, is routinely engaged in speech on an occupational basis and the underlying tort in this case, defamation, is speech-based, the First Amendment must supersede generally applicable law to permit media employers the right to hire controversial personalities. The Illinois Court's raising the bar of the negligent employment torts to accommodate the media is impermissible under *Cohen*. As laws of general application, these torts may be asserted against Evergreen notwithstanding an indirect impact upon speech.

Evergreen is not being sued for its speech—it is being sued for not exercising ordinary care in its hiring and supervision of employees. Thus, the obligations of Evergreen are the identical obligations the law imposes upon any employer: not to hire or retain employees that it knew or should have known have a particular unfitness for the position and that such unfitness creates a risk of injury to others.

An analogous scenario existed in *Cohen*. There too, the media defendant was not being sued for its speech, the media publication, but for its breach of promise. The publication was the result of its underlying breach. That speech was impacted by the breach of promise, however, did not shield the media from application of the general law of promissory estoppel. Similarly, that Evergreen's breach of its duty to exercise reasonable

care in the hiring and supervision of its employee resulted in a defamatory radio broadcast does not shield Evergreen from the application of the general law of negligence. As *Cohen* demonstrates, the Illinois Court's opinion impermissibly places media employees above the law, based upon First Amendment concerns which are unwarranted.

Other federal courts of appeals and state supreme courts, following *Cohen*, have recognized that the media enjoys no special protection from generally applicable laws and that such laws are to be fully enforced against the media without the creation of special circumstances or higher evidentiary or pleading burdens. In *Gonzales v. National Broadcasting Co., Inc.*, 155 F.3d 618 (2d Cir. 1998) the parties to a civil rights action subpoenaed a videotape taken by a reporter at the scene of an allegedly illegal stop and detention. The media defendant claimed that the First Amendment shielded it from production of the videotape since it was taken in the course of its news gathering activities:

> NBC makes two arguments in support of its claim that producing nonconfidential information will interfere with its First Amendment rights. First, NBC argues that having to disclose nonconfidential, unbroadcast information will interfere with the editorial process. Second, NBC contends that without a privilege for nonconfidential information, news organizations will be flooded with non-party subpoenas, responding to which will hamper news gathering activities.

Id. at 624. Thus, NBC's claims are analogous to Evergreen's claim that subjecting the media to the negligent employment torts would unreasonably cause it to guess

at what its radio personalities might say and create a chilling effect on free speech. In rejecting NBC's claims, the court held:

> This assertion, even if accepted as true, is too remote a burden on the First Amendment to justify the creation of a privilege in this case.
>
> * * *
>
> Additionally, to the extent that the lack of a privilege may affect editorial decisions, it seems that this effect may well accrue to the public's benefit. Specifically, to the extent that the threat of subsequent analysis of editorial decisions increases the accountability of editors for their presentation of the news, such scrutiny is likely to make the final news product more complete, accurate and reliable.

Id.

Moreover, the court found that compliance with a subpoena for nonconfidential information put no additional burden on the press that was not applicable to any citizen. Accordingly, the subpoena was fully enforceable against NBC. The court, quoting *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) found: "Responding to discovery may well take valuable time, decreasing to that extent resources available for news reporting. Yet in the immediate sense, the press here is not differently situated from any other business that may find itself possessing evidence relevant to a criminal trial." *Gonzales*, 155 F.3d at 625. *Accord*, *Herbert v. Lando*, 441 U.S. 153 (1979) (in a defamation case, civil discovery of the a media defendant's editorial process is not afforded special privilege or protection by the First Amendment). The court, therefore, declined to

award the media a shield from subpoenas not available to the general public: "The only question is whether the information is relevant to the Gonzaleses' case and discovery should not otherwise be limited under Fed. R. Civ. P. 26." *Gonzales*, 155 F.3d at 627-28.

The Illinois Court's decision is in direct conflict with *Gonzales* and will serve as a touchstone for the media to argue that it is to be treated differently and is protected from adherence to laws of general application, either in the form of a wholesale immunity or, as in this case, increased standards of pleading and proof before liability may be imparted. This unwarranted departure from *Cohen* requires the intervention of this Court.

Recently, the Supreme Court of California faced an analogous situation in *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998). In *Shulman*, the defendants argued that they were not subject to liability for the tort of intrusion, since the act occurred in the course of news gathering and was therefore protected by the First Amendment. Relying upon *Cohen*, the court rejected defendants' claim: "[D]efendants enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to eavesdrop . . . or otherwise to intrude tortiously on private places, conversations or information." 955 P.2d at 495.

Defendants here similarly should not be shielded from the application of the negligent employment torts. Such laws do not interfere with their employing radio personalities that are controversial; only those who are likely to cause injury to others based upon their prior injury-causing conduct. There is no public interest

served by the heightened pleading and proof protections the Illinois Court has created for media employers, particularly since the negligent employment torts bear only a remote and incidental relationship to speech.

II. THE CONSTITUTIONAL MALICE REQUIREMENT OF *NEW YORK TIMES CO. v. SULLIVAN* PROVIDES AND DEFINES THE BREATHING SPACE FOR THE FIRST AMENDMENT WHEN A NEGLIGENT HIRING INJURY IS BASED UPON A DEFAMATION.

The Illinois Court altered the law of negligent hiring, retention and supervision based upon its view of "first amendment concerns which arise when liability is predicated on speech." (App.1, p.15a.) In so doing, the Illinois Court ignored the constitutional standard for liability predicated upon a defamation or a reputational injury as set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Illinois Court thus created a new standard of liability that redefined the negligent employment torts as applied to the media. However, *New York Times* holds that, in a public figure defamation case, the media will be liable for its speech only when it acts with constitutional malice. This standard provides the breathing space required by the Constitution to protect First Amendment speech as mandated by the United States Supreme Court; not the *ad hoc* creation of artificial and heightened standards for enforcement of general laws.

Van Horne alleged that Evergreen's negligence proximately resulted in his being defamed. As a public figure, he therefore alleged constitutional malice as an integral component of each of the counts alleging neg-

ligent hiring, supervision and retention and is prepared to meet this burden at trial. (App.5, pp.52a, 55a, 56a, 58a, ¶¶44, 51, 54, 62.) Thus, Van Horne met his pleading requirement as defined by this Court with full regard for any First Amendment concerns indirectly impacted by Evergreen's negligence. Any recovery had for negligent hiring, retention or supervision as triggered by the underlying tort of defamation would therefore meet the constitutional standards with due regard for the "breathing space" for which the Illinois Court evidenced concern.

The Illinois Court has accepted Evergreen's argument that the application of the negligent employment torts to the media will chill free speech because media corporations will not hire controversial figures for fear that they might be sued for not accurately predicting (i.e. guessing) what the broadcaster might say. (App.1, p.16a.) However, Van Horne's causes of action are not premised upon Muller being controversial, but upon Evergreen's hiring and retention of Muller when it knew or should have known that he would engage in injury-causing broadcast conduct and speech that is not protected by the First Amendment. Thus, the harm at issue results not from the "controversial" statement, but from speech that is illegal and which has caused actual injury to others. Moreover, a broadcaster is necessarily responsible for what it chooses to air just as a newspaper is responsible for what it chooses to print. This responsibility and the duty that arise from it are heightened in the case of extemporaneous "shock jocks" who have been given license to "Do whatever you want to do—just entertain, have fun." (App.5, p.57a, ¶58, quoting the President of Evergreen Media Corp.)

Through ignoring the injury-causing broadcast speech and conduct at the heart of Van Horne's negligent hiring counts and Evergreen's notice thereof, the Illinois Court found:

> [R]ecognition of this cause of action where the employee had previously engaged only in "outrageous," but nondefamatory, conduct or speech would run afoul of first amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial figure, the reasoning being that such controversial figures are "likely" to engage in defamatory speech.

(App.1, pp.15a-16a.) However, Van Horne's negligent employment causes of action are not predicated upon Muller being controversial or outrageous, but upon his repeated use of his broadcaster's chair to violate civil and criminal laws and cause repeated tangible damage to third persons. These are the facts of which Evergreen had notice, both prior to hiring Muller and after it hired Muller prior to Van Horne's injury.

Contrary to the Illinois Court's analysis, liability for negligent hiring and supervision is not imposed to force an employer to guess what an employee might say; it is imposed to hold the employer responsible when the employer knew or should have known that the employee posed a *foreseeable* risk of harm to third persons. Broadcasters must bear the same responsibility as any other employer and corporate citizen notwithstanding their media status. Moreover, in this case, no guessing

is or was required. Muller's history of injurious and unlawful broadcast speech and conduct were matters of public record when he was hired and continued through this employment.

In *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1515 (1998), the court squarely ruled that speech which incites criminal conduct is not protected. The court, in sustaining the civil action arising from the charged speech stated:

> However, while even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech which, in its effect, is tantamount to legitimately prescribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statues. Cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S.Ct. 2513, 2518, 115 L.Ed. 2d 586 (1991) (noting "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). As no less a First Amendment absolutist than Justice Black wrote for the Supreme Court almost fifty years ago in *Giboney v. Empire Storage & Ice Co.*, in rejecting a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement:
>
> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an in-

> tegral part of conduct in violation of a valid criminal statute. We reject the contention now
>
> . . .

Id. at 243.

As alleged in the Second Amended Complaint, Muller's conduct went beyond "controversial speech" and included unlawful and criminal broadcast speech and conduct which repeatedly caused injury to others. Despite these clear warning signs that would put any reasonable employer on notice of Muller's unfitness, Evergreen recruited, hired and retained him. Muller's past conduct served not as a beacon of warning, but as a promise of higher ratings and revenues. Evergreen enjoyed the benefits of Muller's broadcast activities in the form of increased ratings and profits. It must be required to answer for the foreseeable harm and resulting injuries its negligent hiring and supervision proximately caused. This conduct must be shorn of the unconstitutional shield created by the Illinois Court.

The Illinois Court's decision is predicated upon erroneous First Amendment concerns which are unwarranted and inappropriate based upon this Court's decisions in *Cohen* and *New York Times*. The Illinois Court's ruling will elevate media employers to a status above generally applicable laws such as the negligent employment torts. Certiorari is warranted to (i) establish that media employers may not hide behind the First Amendment with respect to their hiring and employment decisions; (ii) protect against inconsistent decisions as to the liability of media employers for generally applicable laws; and (iii) harmonize the Illinois Court's decision with *Cohen v. Cowles Media Co.*, *New York Times*, and their progeny.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

PAUL M. LEVY*
PHILLIP J. ZISOOK
BRIAN D. SAUCIER
DEUTSCH, LEVY & ENGEL, CHARTERED
225 West Washington Street
Suite 1700
Chicago, Illinois 60606
(312) 346-1460

Attorneys for Petitioner

* Counsel of Record